

Nos. 869-871

52-54

In the Supreme Court of the United States

OCTOBER TERM, 1943

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.
THE SCOTTISH AMERICAN INVESTMENT COMPANY,
LIMITED

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.
BRITISH ASSETS TRUST, LIMITED

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.
SECOND BRITISH ASSETS TRUST, LIMITED

PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

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OCTOBER TERM, 1943

No. 869

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE SCOTTISH AMERICAN INVESTMENT COMPANY,
LIMITED

No. 870

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BRITISH ASSETS TRUST, LIMITED

No. 871

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SECOND BRITISH ASSETS TRUST, LIMITED

PETITION FOR WRITS OF CERTIORARI, TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Fourth Circuit,

entered in the above cases on November 8, 1943, affirming the decisions of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board (R. 76-92) is reported in 47 B. T. A. 474. The opinion of the Circuit Court of Appeals (R. 133-137) is reported in 139 F.2d 419.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on November 9, 1943 (R. 138, 140, 142). On February 5, 1944, the Chief Justice signed an order extending the time within which a petition for certiorari might be filed for sixty days from February 8, 1944 (R. 143). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayers had an office or place of business within the United States in the taxable years 1936 and 1937 so as to qualify as resident foreign corporations within the meaning of Section 231 (b) of the Revenue Act of 1936 and Article 231-1 (b) of Treasury Regulations 94.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

* * * * *

(d) *United States Business or Office.*—

* * * As used in this section, section 119, section 143, section 144, and section 231, the phrase “engaged in trade or business within the United States” includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for such services does not exceed in the aggregate \$3,000. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian.

SEC. 231. TAX ON FOREIGN CORPORATIONS.

(b) *Resident Corporations.*—A foreign corporation engaged in trade or business within the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a), but the normal tax imposed by section 13 shall be at the rate of 22 per centum instead of at the rates provided in such section.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 231-1. *Taxation of foreign corporations.*—

(b) *Resident foreign corporations.*—

As used in section 231, section 119, section 143, section 144, and section 211, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian.

Whether a foreign corporation has an "office or place of business" within the United States depends upon the facts in a particular case. The term "office or place of business," however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

STATEMENT

The Scottish American Investment Company, Limited, British Assets Trust, Limited, and Second British Assets Trust, Limited, are corpora-

trons organized under the laws of Great Britain and have their principal offices in Edinburgh, Scotland. They are engaged in the business of investing the funds of their security holders for the primary purpose of deriving income from investment. (R. 78.) Their boards of directors met frequently in Edinburgh. The two British Assets trusts were managed, as is customary in the case of investment trusts in England and Scotland, by a firm of secretaries engaged in the business of management. (R. 78-79.)

On December 2, 1936, the taxpayers had in excess of \$40,000,000 invested in securities in the United States (R. 78). Prior to 1936, the accounting firm of Barrow, Wade, Guthrie & Company, of which Walter A. Cooper was a partner, had audited the books of The Scottish American Investment Company in connection with deficiencies in its income taxes for the years 1927 to 1934, inclusive, arising from its failure to report profits on sales of securities as income (R. 79).

In 1936 Cooper and Earl Breeding of that firm visited Scotland and discussed with officials of the taxpayers the problem of opening an office for the taxpayers in the United States, including the effect of such an action in view of the new provisions for taxing foreign corporations in the Revenue Act of 1936. Cooper and Breeding left England in November, 1936, without any decision

having been reached by taxpayers with respect to opening offices in the United States. (R. 79-80.)

On December 2, 1936, each taxpayer appointed Cooper as its assistant secretary and cabled him to proceed with opening an office in the United States. The cables were confirmed by letters. (R. 80.)

Immediately upon receipt of the cables Cooper rented office space, consisting of two rooms on the twenty-sixth floor of the Equitable Building, at 120 Broadway, New York City, New York, in which the firm of Barrow, Wade, Guthrie & Company maintained offices on the twenty-seventh floor. A lease was taken out for each taxpayer and a designated part of the office was leased for each taxpayer for a specified sum per year. This office had a telephone which was connected with the switchboard in the offices of Barrow, Wade, Guthrie & Company. Taxpayers' United States office was established in order to enable taxpayers to keep in closer touch with their large United States investments, to do themselves what had formerly been done for them by others, and to gain certain tax advantages. (R. 80.)

Both before and after the opening of the United States office the securities of taxpayers were in the custody of J. P. Morgan & Company and the National City Bank and were registered in the names of nominees. Prior to December 2, 1936, the securities were registered in the names of the bank's regular nominees, each of whom

received a single dividend check on behalf of a number of stockholders. During December 1936, Cooper made arrangements with J. P. Morgan & Company and the National City Bank to designate for each taxpayer a new nominee in whose name were registered only securities of such taxpayer. By the end of December 1936, the new nominees had filed dividend mandates with the corporations, the securities of which were held by the taxpayers, directing payment of dividends and the sending of annual reports, statements, and notices to taxpayers at their United States office. (R. 80-81.)

During December 1936, Cooper obtained the services of several employees of Barrow, Wade, Guthrie & Company to determine methods of handling taxpayer's affairs, to establish proper accounts, install a bookkeeping system, and make current records on temporary sheets, copies of which were transmitted to the main offices in Edinburgh. The temporary records were later written up in final form. The records maintained by the United States office were the original records of taxpayers' transactions, receipts, and disbursements in the United States. All receipts of cash and all disbursements during December 1936, were currently entered in the temporary record. Beginning in December 1936, all expenses of each taxpayer in the United States were paid by the United States office. (R. 81-82.)

Beginning December 1936, and continuing through 1939, the dividends on United States securities to which each taxpayer was entitled were collected by the United States office (R. 82).

During December 1936, some of the dividends were paid directly to J. P. Morgan & Company and the National City Bank because the dividends, while payable in the latter part of December, were payable to stockholders as of a record date prior to filing of mandates by the new nominees. By the end of December most of the dividends were being paid directly to taxpayers' United States office. (R. 82.)

Throughout the taxable years Cooper rendered services as assistant secretary of taxpayers. In addition to Cooper two women were employed full time throughout the taxable years to render stenographic and clerical services. (R. 82.) At Cooper's suggestion each taxpayer in June, 1937, appointed Breeding as an additional assistant secretary, because of the illness of Cooper, who was required by his doctor to take a long vacation (R. 85). From February 1938, through the taxable year 1939, Henry A. Jeffers, an employee of Barrow, Wade, Guthrie & Company, supervised the activities of the office (R. 82).

Interest on bonds owned by taxpayers continued to be collected by the banks having custody of the securities. Checks for dividends collected by taxpayers' United States office were endorsed and deposited by the office in taxpayers' bank

accounts in the United States. After establishment of the office in the United States in December 1936, J. P. Morgan & Company did not send notices, annual reports, or proxies to the taxpayers. (R. 82-83.)

Cooper was authorized by each taxpayer to look after its interests in the United States and as a matter of regular routine to collect interest and dividends and deposit them in taxpayer's bank account, to pay local expenses, to maintain records of all transactions in the United States, to make periodical reports on economic, political and other developments in the United States, to complete and file federal tax returns, and to draw on its bank account in the United States in amounts up to \$5,000 in any one month, and up to any amount upon the countersignature of a director. Cooper's authority in the United States was as great as the authority of any officer or director at the main office. (R. 83.)

While the office of taxpayers was maintained at 120 Broadway, taxpayers filed New York state franchise tax returns. Later, taxpayers moved this office to New Jersey, where they qualified to do business under the laws of that state. The office of taxpayers in New Jersey consisted of a large room with one corner of it partitioned off as a private office. There was an outside telephone in the office with a New Jersey number and a trunk line to the office of Barrow, Wade, Guthrie & Company. (R. 83-84.)

The books and records kept for each taxpayer in the United States office constituted full and adequate records of taxpayers' security transactions, receipt of income, and all disbursements in the United States. Copies of cash sheets and journal entries were furnished to the main office of each taxpayer monthly by taxpayers' United States office. An annual statement was sent to the main office of each taxpayer at the end of December of each year by the United States office. (R. 84.)

The United States office periodically sent to taxpayers' home offices various reports concerning the United States investments, such as annual reports of corporations in which taxpayers had invested, and general developments in the United States, including statistical data issued by the Federal Reserve Bank and the New York Times. The United States office investigated reorganization plans of corporations in which taxpayers owned securities and made recommendations to taxpayers as to what action should be taken by them. (R. 84-85.)

Taxpayers' assistant secretary in the United States had authority to direct nominees to sign proxies and to direct the disposition of stock rights and scrip. He exercised the latter responsibility without consulting the main offices of taxpayers. He had authority to authorize the delivery of specific certificates on sales of securi-

ties for each taxpayer and exercised such authority without consulting the main offices (R. 85).

The United States office prepared the United States tax returns of taxpayers (R. 85).

The expenses of the United States office of the taxpayers were paid out of the amounts received by Cooper for his salary. Cooper's salary from Scottish was paid directly by that company by check or draft. With respect to British and Second British, Cooper drew his own salary checks on the accounts of those taxpayers at the banks. Incidental expenses, such as stationery, office supplies, light, and telephone, were paid by checks drawn by Cooper on taxpayers' accounts. The rent for office space was, at first paid out of Cooper's salary. Later, at Cooper's request, taxpayers assumed the charges for rentals. The amount paid Cooper for salary was subject to adjustment from time to time, depending upon the amount of expenditure incurred in connection with his activities. Every partner of Barrow, Wade, Guthrie & Company who earned outside income was required by the partnership to turn over such income to the firm. (R. 85-86.) The New York office expenses for the taxpayers were as follows (R. 86):

	1936	1937	1938	1939
Scottish	\$1,382.78	\$7,456.86	\$9,391.36	\$7,728.39
British	1,310.07	6,918.76	6,060.72	6,193.82
Second British	599.26	2,853.42	2,799.78	2,533.71

Cooper left the firm of Barrow, Wade, Guthrie & Company on October 31, 1940. Shortly after that time he tendered his resignation as assistant secretary of the taxpayers, which was accepted by each taxpayer. (R. 86.)

Upon the basis of these facts the Board of Tax Appeals held that during the taxable years taxpayers had an office or place of business within the United States within the meaning of Section 231 (b) of the Revenue Act of 1936 and the applicable Treasury Regulations. (R. 91-92). The Circuit Court of Appeals affirmed the Board's decision (R. 137).

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in holding that taxpayers had an office or place of business within the United States during 1936 and 1937 within the meaning of the statute and the regulations.

2. The Circuit Court of Appeals erred in affirming the decisions of the Board of Tax Appeals.

REASON FOR GRANTING THE WRITS

On April 6, 1944, the Circuit Court of Appeals for the Third Circuit decided the identical question, involving the same taxpayers and the same findings of fact but different taxable years, favorably to the Government and therefore inconsistent with the decision herein. *Commissioner v. The Scottish American Investment Co., Ltd.*,

British Assets Trust, Ltd., and *Second British Assets Trust, Ltd.*¹ Although different taxable years are involved, the statute and regulations construed are the same in each case, and the decision of the Third Circuit is therefore in irreconcilable conflict with the decision herein.²

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

APRIL 1944.

¹ A copy of the opinion has been lodged with the Clerk.

² The decision herein likewise appears to apply the statute and regulations differently from their application in *Linen Thread Co. v. Commissioner*, 128 F. (2d) 166 (C. C. A. 2), certiorari denied, 317 U. S. 673, and *Aktiebolaget Separator v. Commissioner*, 128 F. (2d) 739 (C. C. A. 2), certiorari denied, 317 U. S. 661, affirming 45 B. T. A. 243.